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In the Supreme Court of the United States

OCTOBER TERM, 1928

NO. 513

THE UNITED STATES OF AMERICA,
Appellant,

vs.

ARMOUR LIVESTOCK COMMISSION COMPANY ET AL.,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF OKLAHOMA.

BRIEF OF APPELLEES

Statement.

This action is a suit in equity, arising in the District Court of the United States for the Western District of Oklahoma, and brought under the Packers' and Stockyards Act of 1921, C. 64, 42 Stat. 159, U. S. C. A., Title VII, C. 9, to enjoin the enforcement of an order of the Secretary of Agriculture (R. 34), requiring the appellees herein to cease and desist from certain so-called "unfair and unjustly discriminatory practices and devices," as defined in Section 312-A of said act (U. S. C. A., Title VII, 213-A). The

matter was heard by Circuit Judge Kenyon; District Judge, now Circuit Judge, Cotteral, and District Judge Williams. The Court sustained the petition of the bill and permanently enjoined the enforcement of the Secretary's order. The opinion of the Court will be found in 28 Fed. (2d) 63.

The proceedings before the Secretary of Agriculture were initiated by a complaint (R. 12-15) against the appellees herein and others, charging them with using unfair and unjustly discriminatory practices and devices in connection with the buying and selling of livestock in commerce, by refusing and refraining from buying or selling livestock to either the Producers Commission Association or to the Bollinger & Spencer Livestock Commission Company to their prejudice and disadvantage. A hearing was had, argument presented to the Secretary of Agriculture, after which the Secretary issued his findings of fact and conclusions of law (R. 16), in which he finds (Sec. 6) that the appellees "individually and in concert engaged in and used unfair and unjustly discriminatory practices and devices in connection with the handling, buying or selling of livestock in commerce at said stockyards, as defined in Title III, Sec. 312 of said Act," in that the appellees, while freely engaging in the business of buying and selling livestock with each other, "have persistently refrained and refused from handling, buying or selling from the Producers Commission Association, a co-operative market agency and duly registered and qualified to transact busi-

ness at said stockyards, * * * thereby unjustly and unfairly discriminating against said market agency to their prejudice and disadvantage." The same finding is made with reference to the Bollinger & Spencer Livestock Commission Company. Upon these findings and conclusions, the Secretary bases his order that the appellees:

> "Cease and desist from engaging in and using any unfair or unjustly discriminatory practice or device in connection with the buying and selling of livestock in commerce as defined in said Packers and Stockyards Act at the Oklahoma National Stockyards, to the prejudice and disadvantage of the Producers Commission Association and of the Bollinger-Spencer Livestock Commission Company, at the Oklahoma National Stockyards at Oklahoma City, Oklahoma, in violation of Title III of said act (1) by failing or refusing to buy livestock from or sell livestock to said Producers Commission Association and the Bollinger & Spencer Livestock Commission Company in the ordinary course of business or to enter into any business relations with them with respect thereto, while at the same time engaging in and carrying on business freely among themselves; (2) by combining or agreeing among themselves to refrain from buying livestock from or selling livestock to the Producers Commission Association and the Bollinger & Spencer Livestock Commission Association, and (3) in any other manner shown by the record."

In their bill in equity, appellees contend that the enforcement of the Secretary's order should be enjoined because (1) the Secretary's findings were not based upon competent substantial evidence; (2) the appellees, acting individually, had the right to refuse to buy from or sell to the companies named or any others; (3) the alleged

boycott, or conspiracy, was not in violation of law; (4) the Producers Commission Association, because of its limitation of powers as an association, could not qualify or be classed as a market agency, under the Packers and Stockyards Act, regardless of the fact that the Secretary of Agriculture had allowed it to be registered as such; (5) the cause of action, if it did exist, was, under the evidence, a lawful one.

The District Court held that there was substantial evidence to support the findings of the Secretary of Agriculture that there was a combination or conspiracy among the appellees. However, we take issue with counsel for the Government upon their statement, on page 11 of the Government's brief, that the District Court "further held that there was evidence to support the finding of the Secretary that the plaintiffs were engaged in concert in *unfair and unjustly discriminatory* practices in violation of the act by persistently refraining from and refusing to handle, buy or sell livestock from the Producers Commission Association, a co-operative market agency." After having found that there was substantial evidence to support the Secretary's finding that there was concert of action among the appellees it then became a question of law whether or not, under the circumstances, such concert of action was an unfair or unjustly discriminatory practice against the Producers Commission Association and this is the exact question which the District Court passed upon

adversely to the contentions of the United States. At the hearing in the District Court, counsel for the United States consented to certain modifications of the Secretary's order and in its brief, at page 10, the Government narrows the question to be presented to this Court upon its appeal by this statement: "The question submitted to the Court below thus concerns only the validity of the order in so far as it forbade agreements among the remaining plaintiffs (appellees herein) with the Producers Commission Association." The District Court evidently took this view of the matter as did the counsel for appellees, for it bases its permanent injunction against the enforcement of the Secretary's order upon the ground that the evidence was not sufficient as a matter of law, upon which to predicate the cease and desist order of the Secretary of Agriculture. From this order of the Court the Government prosecutes this appeal.

STATEMENT OF PROPOSITIONS.

The propositions of law relied upon by the appellees for sustaining the opinion and order of the trial court, in addition to those contained and outlined in the opinion of the lower court, are as follows:

1. The testimony at the hearing before the Secretary of Agriculture and before the trial court, although held by the trial court to be sufficient to show a concerted re-

fusal upon the part of the appellees to buy from or sell to the Producers Commission Association is not, in law, sufficient upon which to predicate the cease and desist order of the Secretary of Agriculture, because (a) the Packers and Stockyards Act does not prohibit concerted refusal of market agencies and dealers to buy from or sell to other market agencies or dealers. (b) The powers of the Producers Commission Association are so limited by reason of the provisions of the creating statute that it cannot qualify as a market agency or invoke the protection which the Packers and Stockyards Act affords to legally constituted market agencies.

2. Even though this Court should hold the Producers Commission Association to be a market agency, the appellees should, in no event, be required to trade with it in any manner beyond its expressed and incidental powers, and the burden was on the Government in this proceeding to establish that the attempts of the Association to buy from or sell to the appellees were within the statutory powers of said Association.

3. A presumption cannot be based upon a presumption.

Proposition I-a.

The Packers and Stockyards Act does not prohibit the concerted refusal of market agencies and dealers to buy from or sell to other market agencies or dealers.

ARGUMENT.

The sole power of the Secretary of Agriculture to make any order with reference to buying or selling of livestock by market agencies or dealers is conferred in Section 312-A of the Packers and Stockyards Act of 1921, paragraph 213-a, Title VII, U. S. C. A.

Stripped of all verbiage extraneous to the point at issue, this section provides that:

> "It shall be unlawful * * * to engage in or use any unfair, unjustly discriminatory or deceptive practice or device in connection with * * * the buying or selling * * * in commerce at a stockyard of livestock."

The whole complaint of the Secretary of Agriculture and of the Producers Commission Association was that the appellees would not do business with them. Their complaint was not that the appellees used any unfair or unjustly discriminatory practice or device in buying from or selling to the Producers Association. The complaint was that the appellees refused to buy from or sell to the Producers Association.

The order of the Secretary of Agriculture is based upon a finding and conclusion that the appellees, individually and in concert, refused to buy from or sell to the Producers Commission Association. It is not even held

anywhere in the Secretary's findings, conclusions or order that the appellees, or any of them, individually or acting in concert, used any unfair or unjustly discriminatory practice or device in any buying or selling transaction with the Producers Commission Association. Prior to the passage of the Packers and Stockyards Act, this Court held that the business of buying and selling cattle by commission men and traders was not included in interstate commerce, and, therefore, not to be controlled or regulated by the United States or any department thereof. See *Hopkins* v. *U. S.*, 171 U. S. 578. This opinion, as we see it, has never been overruled by this Court, but has been explained, as we shall see later, in the case of *Stafford* v. *Wallace*, 258 U. S. 496, 66 L. ed. 735. The language of the Packers and Stockyards Act nowhere indicates that the act is intended to prevent a group of men, whether acting individually or in concert, from deciding with whom they will deal. The law upon this point, prior to the passage of the Packers and Stockyards Act, was enunciated by the Supreme Court of the United States in the case of *Anderson* v. *United States*, 171 U. S. 604. The syllabus of that case is as follows:

> "An agreement among persons engaged in the common business, as yard traders, of buying at a city stockyard cattle which came from different states, that they will form an association for the better conduct of their business, and that they will not transact business with other yard traders who are not members of the association, is not a violation of the act of July 2, 1890, to protect trade and commerce against unlawful restraints and monopolies.

"A rule of a livestock exchange, that its members shall not recognize any yard trader who is not also a member of the exchange, is not in restraint of, or an attempt to monopolize, trade, where the exchange does not itself do any business, and there is nothing to prevent all yard traders from being members of the exchange, and no one is hindered from having access to the yards or having all their facilities, except that of selling to members of the exchange.

"Rules to enforce the purpose and object of such exchange, if reasonable and fair, cannot, except remotely, affect interstate trade and commerce, and are not void as violations of the act of July 2, 1890."

In the body of the opinion, at page 615, it is said by Mr. Justice Peckham, for the Court:

"In the view we take of this case we are not called upon to decide whether the defendants are or are not engaged in interstate commerce, because if it be conceded they are so engaged, the agreement, as evidenced by the by-laws, is not one in restraint of that trade, nor is there any combination to monopolize or attempt to monopolize such trade within the meaning of the act."

Congress undoubtedly knew the position of the United States Supreme Court upon this subject. It knew that the Supreme Court had said a refusal in concert to deal with non-members was not violative of the commerce act, yet Congress utterly fails to include in the Packers and Stockyards Act any language by which it can be reasonably inferred that it intended to prohibit the organization of market agencies and dealers into associations through which they might refuse to buy or sell from or to an outsider. In other words, we feel that Congress intended to

leave this matter in the same status as it had been since the decision in the Anderson case, *supra.*

We think that our position upon this point is strengthened by the opinion of Chief Justice Taft, in the case of *Stafford* v. *Wallace, supra.* In this case, as well as in the companion case of *Burton* v. *Clyne,* 258 U. S. 496, 66 L. ed. 735, the Supreme Court had before it the validity of the Packers and Stockyards Act and in directing attention to the evident intent of Congress in the passage of the act the Supreme Court, at page 515, said:

> "The chief evil feared is the monopoly of the packers, enabling them unduly and arbitrarily to lower prices to the shipper who sells, and unduly and arbitrarily to increase the price to the consumer who buys. Congress thought that the power to maintain this monopoly was aided by control of the stockyards. Another evil which it sought to provide against by the act was exorbitant charges, duplication of commissions, *deceptive practices in respect to prices, in the passage of the livestock through the stockyards,* all made possible by collusion between the stockyards management and the commission men, on the one hand, and the packers and dealers on the other. Expenses incurred in the passage through the stockyards necessarily reduce the price received by the shipper, and increase the price to be paid by the consumer. If they be exorbitant or unreasonable, they are an undue burden on the commerce which the stockyards are intended to facilitate. Any unjust or deceptive practice or combination that unduly or directly enhances them is an unjust obstruction to that commerce. The shipper whose livestock are being cared for and sold in the stockyards market is ordinarily not present at the sale, but is far away in the West. He is wholly dependent on the commission men. The packers and

their agents, and the dealers who are the buyers, are at the elbow of the commission men, and their relations are constant and close. The control that the packers have had in the stockyards by reason of ownership and constant use, the relation of landlord and tenant between the stockyards owner, on the one hand, and the commission men and the dealers, on the other, the power of assignment of pens, and other facilities by that owner to commission men and dealers, all create a situation full of opportunity and temptation, to the prejudice of the absent shipper and owner in the neglect of the livestock, in the *mala fides* of the sale, in the exorbitant prices obtained, in the unreasonableness of the charges for services rendered."

At page 517 the Court said:

"The Swift case presented to this Court the sufficiency of a bill in equity brought against substantially the same packing firms as those against whom *this legislation is chiefly directed.*"

In the discussion by the Supreme Court in the *Stafford* v. *Wallace* case, of *Hopkins* v. *United States, supra,* and *Anderson* v. *United States, supra,* the Court said:

"So, again the line is distinct between this case and *Hopkins* v. *United States,* 171 U. S. 578, 43 L. ed. 290, 19 Sup. Ct. Rep. 40. All that was decided there was that the local business of commission merchants was not commerce among the states, even if what the brokers were employed to sell was an object of such commerce. *The brokers were not like the defendants before us, themselves the buyers and sellers. They only furnish certain facilities for the sales.* Therefore, there again the effect of the combination of brokers upon the commerce was only indirect and not within the act. Whether the case would have been different if the combination had resulted in exorbitant charges was left open. In *Anderson* v. *United States, supra,* the defendants were buyers and sellers at the stockyards,

but their agreement was merely not to employ brokers, or to recognize yard traders who were not members of their association. Any yard trader could become a member of the association on complying with the conditions, and there was said to be no feature of monopoly in the case. It was held that the combination did not directly regulate commerce between the States, and, being formed with a different intent, was not within the act * * *.

"Again, if the result of the combination of commission men in the Hopkins case had been to impose exorbitant charges on the passage of the livestock through the stockyards from one State to another, the case would have been different as the court suggests. The effect on interstate commerce in such a case would have been direct. *Similarly, in the Anderson case, if the combination of dealers had been directed to collusion with the commission men to secure sales at unduly low prices to the dealers, and to double commissions, or to practice any other fraud or oppression calculated to decrease the price received by the shipper and increase the price to the purchaser in the passage of livestock through the stockyards to subordinate commerce, this would have been a direct burden on such commerce and within the anti-trust act*" (Italics ours).

It seems to us that by this language the Supreme Court has reaffirmed the doctrine announced in the Hopkins case and the Anderson case and has in all intents made a finding that the law, with reference to the organization of livestock exchanges and the right to refuse to deal with non-members, is not interfered with by the Packers and Stockyards Act, in any way, except in such instances as are pointed out in the above decision. In the case at bar, none of the exceptions mentioned by Chief Justice Taft

appears from the record. There is no showing that interstate commerce has been disturbed in any way.

We are not unmindful of the fact that one of the members of the trial court was a member of the Senate at the time of the passage of the act and had much to do with the passage of legislation looking to the benefit of the agricultural interests as well as the other interests of the country. We know that he and other members of Congress understood the law as it had been interpreted by the United States Supreme Court. For that reason the omission from the Packers and Stockyards Act of language, which would indicate the intent of Congress to prohibit concerted action by exchanges or commission men and dealers in refusing to buy from or sell to others, becomes more significant.

What would be a reasonable construction of the language used in the Packers and Stockyards Act, prohibiting unfair and unjustly discriminatory practices and devices in the buying, selling, marketing, etc., of livestock at a stockyard?

Keeping in view the language of Chief Justice Taft in *Stafford v. Wallace*, supra, that the principal object of the act was to break the power of the packers in their attempt to control and monopolize the stockyards, the market agencies and the dealers, it seems to us that this language is meant to protect shippers to the stockyards instead of being meant to force any market agency or a member of market agencies to buy from or sell to some other

market agency. That this language is meant to protect shippers of livestock from misrepresentation and fraud, from exorbitant charges, from deceitful reports as to the price at which cattle were sold and many other acts, which might be enumerated, directly affecting the interests of the shippers, who, in many instances, are not on the market to protect themselves. In other words, to compel the stockyards owner, the commission agent and the dealer to act with the utmost good faith toward the shipper and also to prohibit unfair and deceitful practices between the stockyards owner, the market agency and the dealer in those transactions, *which they actually have* had with each other. This would not be a strained construction and would not call for any judicial legislation. However, when nothing at all is said in the act about a refusal to deal, to buy, to sell, either individually or in concert, of one or a group of agencies or dealers with some other agencies or dealers, it seems to us that to read such a meaning into the act would be usurping the power of Congress *in making law rather than the construction of a law already made*.

If we are correct in this contention, the evidence was, in law, insufficient upon which to predicate the cease and desist order of the Secretary of Agriculture.

Proposition I-b.

The testimony adduced in this case is insufficient as a matter of law upon which to predicate the cease and desist order of the Secretary of Agriculture for the reason that the powers of the Producers Commission Association are so limited by the provisions of the creating statute that it cannot qualify as a market agency or invoke the protection which the Packers and Stockyards Act affords to legally constituted market agencies.

ARGUMENT

The Producers Commission Association was organized in 1924 under the provisions of Sections 5598 to 5621, inclusive, Compiled Oklahoma Statutes of 1921, as amended by Chapter 181, Session Laws of 1923. For the sake of brevity we only quote those portions of this act which set forth the powers of the Association, and such other portions as seem necessary to this phase of the discussion.

> "Section 5599. Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize cooperative associations, *not having capital stock, and not conducted for profit, for mutual help* in collectively processing, preparing for market, picking, storing, shipping, handling and *marketing such products of persons so engaged*; and the manufacturing or the making of the by-products thereof; or in the financing any of the above activities; and *may have marketing agencies in common with other like or similar associations;* and such associations and their members may make all necessary contracts and agreements to effect such purposes; and such associations may make advances to members, *and such members may rent, hire or buy their farm supplies and machinery from or through the association;* provided that such *association shall be operated for the mutual benefit of the members thereof, only as producers* * * *."*

The remainder of the section has no bearing on the matters at issue here.

"Section 5600. An association, in processing, preparing for market, handling and marketing *such products of persons so* engaged, which shall include any by-products thereof as well, may, in addition to all other powers given by this act, and to effect the purposes of this act, pledge, hypothecate, mortgage, market or sell any such products as effectively as may be done by the member or members owning the same, or such associations may acquire title thereto, and pledge, hypothecate, mortgage, market and sell the same.

"Section 5601. The persons uniting to form an association shall enter into Articles of Association in writing, which shall state:

* * * * * * *

"(b) The class of service to be performed for its members, which services shall be among those mentioned in sections two and three of this act.

* * * * * * *

"(g) * * * The words 'Articles of Incorporation' and 'Articles of Association' shall be taken as meaning the same.

"Section 5603. Upon filing by the county clerk of the copy of the Articles of Association transmitted to him by the Secretary of State, * * * the Association shall have power, *within the limitations of this act*:

"(c) To *perform for its members services prescribed in its Articles of Association*, and to exercise with respect to such services all the rights and powers herein given.

"(e) To purchase, lease or receive by gift, bequest or devise and to hold real and personal property necessary in the conduct of its operations and to dispose of same; and to process, prepare for market, handle, pledge, hypothecate, mortgage, market or sell any and all such products mentioned in sections 2 and 3 of this

act, or to acquire title thereto and to process, manufacture, can, pick, store, ship, prepare for market, handle, pledge, hypothecate, mortgage, market or sell the same and the action of the Association in pledging, hypothecating, mortgaging, encumbering, marketing or selling any such products, shall be conclusive on all members of the Association.

"(j) *To enter into all necessary and proper contracts and agreements and make all necessary and proper stipulations, agreements and contracts and arrangements with any other co-operative association or associations* formed in this or in any other State for the co-operative and more economical carrying on of its business or any part or parts thereof * * *.

"(p) To do each and everything necessary, suitable or proper for the accomplishment of any one of the purposes * * * enumerated in this act * * *; and in addition thereto to exercise and possess all rights, powers and privileges necessary or incidental to the purpose for which the Association is organized * * *; and in addition, any other rights, powers and privileges granted by the laws of this State to ordinary corporations, *except such as are inconsistent with the express provisions of this act* * * *.

"Section 5604. *Under the terms and conditions prescribed in the by-laws adopted by it, the Association may admit as members only persons engaged in the production of horticultural or agricultural products to be handled through or by the Association.* * * *.

"Section 5608. No Association organized hereunder shall handle the agricultural or horticultural product of any non-member except for storage" (Italics ours).

It is apparent from the act that this Association (1) is one not having capital stock and not conducted for profit; (2) that it is formed for the *mutual help of its members in marketing the agricultural and horticultural products*

of its members; (3) that it may have marketing agencies in common with other like or similar associations; (4) that the Association shall be operated for the mutual benefit of the members thereof *only as producers;* (5) that the members of the Association may hire, rent or buy their farm supplies and machinery from or through the Association; (6) that the Association may, under certain conditions, market or sell the products and by-products of its *members*, or the Association may acquire the title of such property of its members; (7) the Association cannot handle the agricultural or horticultural products of any non-members, except for storage. The Producers Commission Association had no power to buy any of the livestock on the Oklahoma City yards, *except such livestock as might be shipped to it by its members as the producers of such livestock.* It could not buy livestock from any other market agency or dealer on the yards. It had only the power to sell such livestock as might be consigned to it *by its members.* We assume it will not be disputed that these limitations upon the power of the Producers Commission Association could not be enlarged by the provisions of the Packers and Stockyards Act or by any other power except its creator, the State of Oklahoma, and that its powers and authority are to be measured by the law of its creation.

We offer the following citations, among the hundreds of cases, which sustain this doctrine: In *Central Trans-*

portation Co. v. *Pullman*, 139 U. S. 24, 35 L. ed. 55, this Court, in the syllabus, uses the following language:

> "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental; all contracts made by a corporation beyond the scope of those powers are unlawful and void.
>
> "A contract made by a corporation which is beyond the powers conferred upon it by the Legislature, and which involves an abandonment by the corporation of its duty to the public, is unlawful and void.
>
> "A contract between two corporations, in order to bind either of them, must be within the corporate powers of both.
>
> "A contract of a corporation which is beyond the powers conferred upon it by the Legislature is not voidable only, but wholly void; it cannot be ratified by either party; no performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it."

In the body of the opinion the Court says:

> "Upon the authority and the duty of a corporation to exercise the powers granted to it by the Legislature, and those only; and upon the invalidity of any contract, made beyond those powers, or providing for their disuse or alienation—there is no occasion to refer to decisions of other courts, because the judgments of this Court, especially those delivered within the last twelve years by the late Mr. Justice Miller, afford satisfactory guides and ample illustrations."

And, at page 64, the Court further says:

> "The clear result of these decisions may be summed up thus: The charter of a corporation read in the light of any general laws which are applicable, is the meas-

ure of its powers, and the enumeration of those powers implies the exclusion of all others not fairly incidental. All contracts made by a corporation beyond the scope of those powers are unlawful and void, and no action can be maintained upon them in the courts, and this upon three distinct grounds: the obligation of everyone contracting with a corporation, to take notice of the legal limits of its powers; the interest of the stockholders, not to be subjected to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law."

In the case of *Augusta Bank* v. *Earle*, 13 Peters (U. S.) 519 (587), 10 L. ed. 274, Mr. Chief Justice Taney said:

"It may be safely said that a corporation can make no contracts and do no acts, either within or without the State, which creates it, except such as are authorized by its charter, and those acts must also be done by such officers or agents, and *in such manner* as the charter authorizes."

In *Head* v. *Providence Ins. Co.*, 2 Cranch (U. S.) 127 (167), 2 L. ed. 229, Chief Justice Marshall, speaking for the Court, used this language:

"Without ascribing to this body, which, in its corporate capacity, is the mere creature of the act to which it owes its existence, all the qualities and disabilities annexed by the common law to ancient institutions of this sort, it may correctly be said to be precisely *what the incorporating act has made it*, to derive all powers from that act and to be capable of exercising its faculties only in the manner which that act authorizes. *To this source of its being then*, we must recur to ascertain its powers."

In the case of *Peck-Williamson & Co.* v. *Board of Ed-*

ucation, 6 Okla. 280, the Supreme Court of this State, speaking through Justice McAtee, said:

> "The plaintiff was a corporation chartered for 'the purpose of manufacturing and selling heating and ventilating apparatus' and for no other purpose and had no power by its officers to become a negotiator or broker of bonds upon commission. The charter of the plaintiff was full and sufficient notice to the defendant of the limitations of the plaintiff's authority in that respect."

See, also:

> *Myatt* v. *Ponca City Land & Improvement Co.*, 14 Okla. 189.

In the case of *Derr et al.* v. *Fisher et al.*, 22 Okla. 126 (143), Justice Dunn, speaking for the Court and quoting from *Richelieu Hotel Co.* v. *International Military Encampment Co.*, 140 Ill. 248, 29 N. E. 1044, used this language:

> "We understand the rule to be that corporations have such powers as are expressly given them by the law which authorizes their creation and such other powers as are necessarily incidental to the proper exercise of such express powers. The express powers are readily ascertained from the statute of the charter of the corporation * * *. The incidental powers are such as are necessary to the efficient exercise of the express powers."

Measuring the powers of the Producers Commission Association to buy and sell livestock by the yardstick of the United States Supreme Court and the Oklahoma Supreme Court, we are driven to the conclusion that, under the law by which the Producers Commission Association

was created, it could not, in any event, become a market agency, except that, it might do business with, buy from and sell to organizations similar to it.

The only functions which the Government contends that this Association could perform with reference to livestock, under its statutory powers, were: (1) sell livestock, on a commission basis, produced and owned by its members; (2) buy livestock from its members and sell such livestock as the owner. In the first instance, it would be assuming to act as a market agency. In the second instance, it would be attempting to act as a dealer, as defined in Section 301 of the Packers and Stockyards Act. This hydra-headed Doctor Jekyll and Mr. Hyde characteristic of this Association is recognized and admitted by the Government on page 17 of its brief. In other words, it could act as agent for its members along certain limited lines and as its own principal along certain other limited lines. We do not believe that it was the intent of Congress to extend the protection of the Packers and Stockyards Act to any person or organization assuming to act thereunder as both principal and agent. The knowledge was within its own bosom as to when it was Doctor Jekyll and when it was Mr. Hyde; that is, as to when it was selling livestock as a market agency and when it was selling stock as a dealer. No one else could have that information. But the record shows that the Association was registered by the Secretary of Agriculture as a market agency

and not as a dealer. We recognize the fact that co-operative organizations, when clothed with proper powers by the statutes of their creation, may become either market agencies or dealers or even stockyards owners, as the case may be, and that when they are clothed with proper statutory authority they may claim all the benefits and protection and must assume all the burdens cast upon them by the Packers and Stockyards Act, but to recognize such an Association as this to be a market agency, as defined by the Packers and Stockyards Act, would, we think, be arbitrary and unreasonable. To say that the refusal of other market agencies, whether acting individually or in concert, to do business with such agency constitutes an unfair or unjustly discriminatory practice would be placing an unreasonable and unjust burden upon the other market agencies so charged.

The ordinary market agency both buys and sells upon a commission. It does not buy or sell in any other way. The ordinary livestock dealer, as defined by the Packers and Stockyards Act, buys from whom and sells to whom he chooses and is not circumscribed by limitations as to membership or otherwise. It certainly would be unfair, unreasonable, unjust and arbitrary to compel livestock agencies and dealers to carry on the one-sided business of buying from an association, when that association has no power and could not be compelled, because it does not have the authority, to buy from other market agencies or dealers.

Under the statute, by which this Association is created, how could any of these plaintiffs safely undertake to deal with the Producers Commission Association and how could they legally be charged with a conspiracy to refuse to enter into contracts with the Producers Commission Association, which that Association had neither the power to make nor to execute? It is fundamental that a conspiracy must be against a lawful act; that is, an act lawful to the party against whom the conspiracy is alleged to exist. Who would say that it is unlawful or that it would be an unfair or unjustly discriminatory practice or device to enter into a concerted action or agreement with other persons for the purpose of keeping either the Producers Commission Association or any other individual or corporation from committing theft, murder, arson or any other unlawful act, whether *malem in se* or *malem prohibitum*, whether unlawful civilly or unlawful criminally?

The lower court held that, on account of the peculiarly limited powers of the Producers Association, it did not qualify as a market agency and this was one of the grounds for the court's decision adverse to the contention of the Government. There is, and was at the time of the organization of the Producers Commission Association, a perfect procedure laid down by the laws of the State of Oklahoma for the organization of co-operative corporations, which could, in every respect, fulfill the requirements of the law as to stockyards owners, market agencies or deal-

ers. We refer to Sections 5637 to 5652, inclusive, being Article XIX, Chap. 34, C. O. S. 1921, which is made a part of this record upon appeal. We quote so much thereof as seems necessary for this discussion:

"Section 5637. Corporations Authorized—Purposes. Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, livestock, irrigation, horticultural, mercantile, manufacturing, mechanical or industrial business upon a co-operative plan, and, with their associates, successors and assigns may become and be a body politic and corporate by complying with the provisions of this act.

"Section 5638. Articles of Incorporation. The incorporators shall sign and acknowledge, in the manner required for the signing and acknowledgment of deeds, a certificate of incorporation showing the following facts: (1) The corporate name. (2) The purpose of corporation. (3) The amount of capital stock. (4) The number of shares, and the par value of the shares into which the capital stock is divided. (5) The term of the corporate existence. (6) The number of directors, not less than five and the names and addresses of the incorporating directors who shall manage the concerns of the corporation for the first corporate year. (7) The name of the town or post office and the county where the principal office or place of business of the corporation shall be located. (8) Any further provision, not inconsistent with law, which the incorporators may deem expedient to be embodied in such certificate.

"Section 5639. Filing of Articles—Certificate—The articles of incorporation shall be filed with the Secretary of State whereupon he shall issue to the corporation over the Great Seal of the State of Oklahoma, a certificate that the articles containing the required statement of facts have been filed in his office, and thereupon the persons signing the articles and their associates, successors and assigns shall be a body

politic and corporate by the name and for the purposes stated in said article. Provided, that any corporation doing business as mentioned in section one, now operating in the State of Oklahoma, may, at a regular or special meeting of the shareholders called for such purpose, by a majority vote elect to operate under the provisions of this act, after the action taken at such meeting shall be properly certified by the secretary of such corporation to the Secretary of State.

"Section 5641. Powers. Each corporation formed under the provisions of this act shall have power: (1) To have succession by its corporate name for the period limited in its certificate. (2) To sue and be sued, complain and defend in any court. (3) To establish and use a common seal and alter the same. (4) To hold, purchase and convey real and personal property as the purpose of the corporation may require, including stock in subsidiary or allied co-operative corporations within or without the State. (5) To appoint such officers and agents as the business may require, including in every case a president and secretary, and to fix their compensation. (6) To make by-laws not inconsistent with law for the management of its property, the regulation of its business and the transfer of its stock. (7) To exercise all other lawful powers necessary or proper for the exercise of the powers herein conferred.

"Section 5648. Dividends and Profits — Reserved Fund. The directors, subject to revision by the stockholders, at any general or special meeting lawfully called, shall apportion the net earnings and profits thereof from time to time at least once in each year in the following manner:

"(1) Not less than ten per cent thereof accruing since the last apportionment shall be set aside in a surplus or reserve fund until such fund shall equal at least fifty per cent of the paid up capital stock.

"(2) Dividends at a rate not to exceed eight per cent per annum, may, in the discretion of the directors,

be declared upon the paid up capital stock. Five per cent may be set aside for educational purposes.

"(3) The remainder of such net earnings and profits shall be apportioned and paid to its members ratably upon the amounts of the products sold to the corporation by its members, and the amounts of the purchases of members from the corporation; provided, that if the by-laws of the corporation shall so provide the directors may apportion such earnings and profits in part to non-members upon the amounts of their purchases and sales from or to the corporation."

This act was passed by the Legislature of Oklahoma in 1919. The powers of the co-operative corporation, formed under the provisions of the 1919 Act, are very broad. Under that act the co-operative corporation is allowed to buy and sell the products of non-members as well as of members. It can do a general agricultural, *dairy, livestock, irrigation*, horticultural, *mercantile, manufacturing, mechanical or industrial business upon a co-operative plan.* However, under that act, there must be a capital stock and the subscribers to the capital stock have the financial responsibility of the ordinary corporation shareholder. If the Producers Commission Association had desired, it could have incorporated under the Act of 1919 and would thereby have brought itself within the provisions for the organization of co-operative associations by the Packers and Stockyards Act. Not having done so, but having elected to organize under a statute which gives it such limited powers, it cannot be heard to complain, because of the limitations to which it has voluntarily subscribed.

There is a difference between the expressed purposes of the co-operative association authorized by the Statute of 1923, under which the Producers Commission Association was organized, and the expressed purposes of the ordinary co-operative corporation organized under the general law of 1919, just mentioned, which, in our opinion, must be decisive of this case contrary to the contentions of the Government. Section 5599 of the Comp. Oklahoma Stats. 1921, names the purposes for which the Producers Commission Association might be organized under the statute of its creation as follows:

> "Any number of persons, not less than five, engaged in the production of agricultural or horticultural products, may act together and organize co-operative associations not having capital stock and not conducted for profit, for mutual help in collectively processing, preparing for market, picking, storing, shipping, handling and marketing such products of persons so engaged; and the manufacturing or the making of the by-products thereof; or in the financing of any of the above activities."

Section 5637, defining the purposes for which co-operative corporations may be organized, provides that:

> "Ten or more persons may form a corporation for the purpose of conducting an agricultural, dairy, *livestock*, irrigation, horticultural, mercantile, manufacturing, mechanical or industrial business upon a co-operative plan" (Italics ours).

The Legislature of 1919, by this provision just quoted, had already recognized the distinction between a livestock business and an agricultural or horticultural business, as

applied to co-operative enterprises. In 1923, when the Legislature of Oklahoma enacted the bill, under which the Producers Commission Association is organized, it did not mention the livestock business as being one of the purposes for the organization of an association under its provisions.

Having already established, in the 1919 Act dealing with co-operative enterprises, a statutory distinction between *tgricultural*, dairy, livestock, irrigation, *horticultural*, mercantile, manufacturing, mechanical and industrial businesses on a co-operative plan, we conclude that the failure to include any but horticultural and agricultural products in the 1923 Act as the subject of that legislation was done with the purpose in view of denying to persons who might desire to engage, co-operatively, in the dairy, livestock and other commercial businesses, the benefit of the provisions of that act. It seems to us that there could not be a more manifest intention upon the part of the Legislature that the maxim, "*Expressio unius est exclusio alterius*," should apply.

We assert that a reading of the entire statute, under which the Producers Commission Association was formed, in comparison with Article XIX, Chap. 24, C. O. S. 1921, dealing with the organization of co-operative corporations, will, in our opinion, convince any student of statutory construction that it was not the intention of the Legislature of the State of Oklahoma to grant power to any association

organized under the 1923 law to engage in a livestock commission business or any other industrial or mercantile business, but its entire plan, scope and purpose was to give to the farmers of the communities a co-operative plan, by which they might economically process, gather, handle, market and sell their products of the soil.

There is another interesting situation which presents itself in this case in the construction of the Statute of Oklahoma as applied to the provisions of the Packers and Stockyards Act. Judge Kenyon, as has already been pointed out, probably knows more about the intent of Congress in the passage of the Packers and Stockyards Act than any other judge upon the bench, for the reason that so far as we know he is the only person on the bench today who was a member of Congress at the time of the passage and who assisted in the passage of that act. Judge Williams, District Judge for the Eastern District of Oklahoma, was a member of Oklahoma's Constitutional Convention and for years Associate Justice and Chief Justice of the Supreme Court of the State of Oklahoma. Judge Cotteral has been upon the United States District bench in the State of Oklahoma since the admission of Oklahoma into the Union. We believe that no two men could be found better qualified to pass upon the meaning, intent and purpose of Oklahoma Statutes than the two distinguished jurists last mentioned. With the peculiar knowledge of Judge Kenyon as to the Packers and Stockyards Act, coupled with the intimate

knowledge of Judges Cotteral and Williams, as to the spirit, intent and proper interpretation of the laws of the State of Oklahoma, we know of no other tribunal to be found upon the trial bench more competent to correctly interpret and reflect the spirit of the laws involved.

But, it might be said, that the Producers Commission Association had some kind of a *de facto* power to buy and sell freely and without limitation upon the Oklahoma City market, and, therefore, such business as it did, or offered to do, should be held by reason of such *de facto* power to be legal. But the cases, so far as we know, universally held that, while there is such a thing as the exercise of power by a *de facto* corporation, there is no such thing known to the law as the exercise of a *de facto* power by a corporation, which legally exists and has prescribed powers. 14-A C. J. 249, note 73; *Baca, etc., Ry. Co.* v. *Sierra Valley Ry. Co.* (Cal.), 84 Pac. 298, and *Gillette* v. *Aurora Ry. Co.*, 228 Ill. 261, 81 N. E. 1005.

We believe that, under this proposition, the order of the lower court must be sustained.

Proposition II.

The burden rested upon the Government in this proceeding to show that the attempts of the Producers Commission Association to buy from or sell to appellees were within the statutory powers of the Association.

ARGUMENT

Appellant, at pages 13 and 14 of its brief, states under four heads the propositions upon which it asserts the trial court erred in holding that the cease and desist order of the Secretary of Agriculture should be enjoined. However, we think the four assignments of error are epitomized in the first assignment, wherein the appellant complains that:

> "The District Court erred in holding that either in the hearing before the Secretary or in the District Court the burden was upon the Government to negative the allegation that the Producers Commission Association was acting *ultra vires*, and in holding that the burden was upon the Government to establish affirmatively that the livestock offered for sale by the Producers Commission Association on these stockyards came from members."

The Government, in its summary of argument, page 14 of its brief, complains that "there is nothing in the record to suggest that the boycott of the Producers Commission Association resulted because that Association was exceeding its powers."

However, that is beside the question. If appellees had the right to refuse in concert not to deal with the Producers Commission Association, what their expressed or

unexpressed reason was for so doing is of no consequence. It would be a dangerous doctrine to announce that a party may be punished for doing that which he had a right to do if, in the judgment of some governmental department, his motive were unworthy. Such a theory is not consonant with law, reason or justice. "As long as a man keeps himself within the law by doing no act which violates it, we must leave his motives to Him who searches men's hearts."

In *Adler* v. *Fenton*, 24 Howard 407, 16 L. ed. 696, this Court announced that "an act legal in itself and violating no right, cannot be made actionable on account of the motive which superinduces it. It is the province of ethics to consider of actions in their relation to motives, but jurisprudence deals with actions in their relation to the law, and for the most part, independent of motive."

In the case of *Warax* v. *Cincinnati, N. O. & T. P. R. Co.*, 72 Fed. 637, Justice Taft said, "If the right exists, the motive for its exercise cannot defeat it."

This doctrine holds true with reference to concerted action, unless it is shown that the concert of action was for the purpose of doing an unlawful act. We have never yet heard the theory urged that a concerted refusal to engage with another in an unlawful act, regardless of the motive for such refusal, could be classed as an unfair or unjustly discriminatory practice or device.

This is the position taken by the trial court when it says:

"Plaintiffs complain of the order in this case on the ground that the Association was not authorized within its corporate powers to buy and sell livestock at this yard, and hence they were not obligated to deal with or recognize it or subject to this coercive order respecting the transactions in question. We think their position is well taken, and that it must be immaterial on what ground they seek to justify their conduct, so long as they were within their rights * * *.

"It is clear that this Association was authorized only to buy and sell livestock of its members. Any other transactions were outside of its express and incidental powers. No testimony has been pointed out as to the transactions of the Association, except that its manager and salesman bought and sold livestock at the yard, and none that they sold livestock of the members of the Association. It was incumbent upon the Government to show its right to engage in these transactions.

"Where the State Legislature has seen fit to thus limit the powers of an organization, the buying and selling of livestock of others by it at the stockyards were acts that were *ultra vires*, or, more accurately stated, wholly illegal in character. It is to be said that even if plaintiffs had contracted with this Association and the contracts were executory, they could not be enforced * * *. The plaintiff, therefore, not only had no duty to recognize the agents of the Association, but it was their absolute right to refrain from dealing with them."

We think no clearer statement of the law could be made.

The Government admits in its brief (page 18) that the Association was exceeding its corporate authority in its *ultra vires* attempts to buy stock from the appellees. The

Government also admits in its brief (page 17) that it was acting as a "dealer" and not a "market agency" when engaged in selling livestock which it had purchased from its members. In the first instance, it was violating the statutes under which it was created. In the second instance, it was transcending its alleged authority and privilege under the status which the government claims for it as a market agency. Appellees are charged with having failed to deal with it as a "market agency." Its action in buying stock from appellees or in selling appellees stock which it owned was unlawful and *ultra vires*.

There is then not a single lawful function which it could perform except the sale on commission of the livestock of its members. The Government says that a "general presumption of right acting attends a corporation, the effect of which is to place the burden of proof that an act done or contract made was *ultra vires* upon him who alleges that fact as the foundation of his action or defense." The Government cites three authorities upon this proposition, and calls attention to others.

This is probably a correct general statement of the law, but it is not applicable to the case at bar. In the first place, this is not an action between parties to an illegal or *ultra vires* contract. It is not a case where property has been acquired in excess of corporate powers, nor a case where the parties have so dealt with each other that one of them is estopped from pleading a want of corporate

power to act. This is not a case where any "act was done or contract made;" on the contrary, it is a case where there was a positive refusal to do an act or enter into a contract.

At any rate, just how far does the general presumption attend the legality of the actions of a corporation? Just how long is a corporation clothed with the presumption that its actions are such as are authorized by law?

In the case at bar, all of the acts of the Producers Commission Association in buying and selling upon which there is any proof are shown to have been illegal, *ultra vires* and void.

Can it be said that any presumption will or should be indulged as to the legality and validity of other acts of selling concerning which the legality or illegality is not shown by the proof? We think such a presumption would do violence to the canons of sound law, good reason and common sense.

As we have already pointed out, this is not an action between the parties to a contract. This is a quasi-criminal action brought by the Government of the United States, not because of any act done or contract entered into or performed, but because of the refusal of the appellees to act or contract with the Producers Association.

In this character of an action the Government can well say (page 15, Government's brief), that "We have no rea-

son to insist that the transactions of the Producers Commission Association, outside of its corporate powers, should receive the protection of the provisions of the Packers and Stockyards Act."

In the case of *McMullen* v. *Hoffman*, 174 U. S. 658, 43 L. ed. 1117 (1124), this Court used the following language:

> "Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

Appellant, under the reasoning of the above case, might have gone further and said that law, reason and the ordinary desire for justice demand that any individual, firm or corporation seeking the protection of this or any other arm of the Government must affirmatively, and without relying upon doubtful presumptions, show itself entitled to that protection before the might and majesty of the Government will be sent to its aid.

Under the decision of the trial court as to the evidence of concert of action among appellees, if the Producers Commission Association was entitled to the benefits and protection afforded a "market agency" under the provisions of the Packers and Stockyards Act; if its actions were lawful, then a cease and desist order might be sustained.

On the other hand, if the Association was not, on account of its statutory limitations, or for other reasons, a market agency, it was not lawfully assisting in the movement of livestock in commerce, and would not be entitled to the protection of the Packers and Stockyards Act. If, being a market agency in a limited sense and with limited powers, its acts in the sale or purchase of livestock were *ultra vires* and void, the appellees could not lawfully be ordered to cease and desist from refusing to join with the Association in such unlawful acts.

Under the limited powers of the Association it became necessary for the Government to affirmatively show that the acts of the Association were lawful, especially in view of the fact that the record shows that all of its explained acts were unlawful and does not show that any of its acts were lawful.

The knowledge as to whether or not the Producers Commission Association was acting in a lawful manner in its efforts to sell to the appellees was peculiarly in the hands of the Government. Within the bosom of the Government's witnesses reposed the knowledge as to whether the Association had a membership; as to whether those members were producers of livestock; as to whether those members were consigning that livestock to the Producers Commission Association for sale upon commission as a market agency; as to whether the livestock which the Association was attempting to sell was the property of non-

members or of members; as to whether the livestock which the Association was attempting to sell was or was not the property of the Association and, therefore, whether the Association was attempting to act as a "market agency" or as a dealer. With this testimony and this knowledge peculiarly within the possession of the United States, it cannot deny that it knew the facts. The burden was upon the Government to produce those facts and that testimony, and having failed so to do with reference to the livestock which the Producers Commission Association desired to sell, it must be presumed that the testimony would have shown that the stock did not belong to the members of the Associtaion (if there were any such members), and that the Association had not received the stock from its members for sale upon commission, and that the actions of the Association in attempting to sell livestock were therefore unlawful and *ultra vires*.

In the case of *Groves* v. *United States*, 150 U. S. 118, 37 L. ed. 1021, this Court said:

> "The rule, even in criminal cases, is that if a party has it peculiarly within his power to produce witnesses whose testimony would elucidate the transactions, the fact that he does not do it creates the presumption that the testimony, if produced, would be unfavorable."

See, also, *Runkle* v. *Burham*, 153 U. S. 217, 38 L. ed. 694.

In the case of *United States* v. *Grogg*, 9 Fed. (2d) 425, the following language is found in the syllabus:

"Where subject-matter of negative averment is peculiarly within the knowledge of the adverse party, averment is taken as true, unless disproved by adverse party."

In the body of the opinion, the Court has this to say:

"It is a familiar common law rule that, where a right of relief is grounded on a negative assertion, or where a negative allegation is essential to the assertion of a right, the burden of proving the negative rests on the party asserting such right (citing many authorities) * * *.

"There is an exception to the foregoing rule, often properly applied, as follows: Where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true, unless disproved by the other party. See 1 Greenleaf, Ev. (14th and 16th ed.), paragraph 79; 1 Elliott, Ev., paragraph 141; 10 Ruling Case Law, paragraph 53, page 902; 3 Encyc. Ev., pp. 804-805; 22 Corpus Juris, pp. 70, 71."

In the case of *Standard Oil Co.* v. *State* (Tenn.), 100 S. W. 705, which was an action by the State against the oil company for the violation of an anti-trust statute, the Court said:

"The presumption always is that competent and pertinent evidence within the control or knowledge of a party which he withholds is against his interest and insistence."

The rule was adhered to in *Fowler Packing Co.* v. *Enzenperger*, 94 Pac. 995, where the Supreme Court of Kansas said:

"As a general rule, the omission by a party to pro-

duce important testimony relating to a fact of which he has knowledge, and which is peculiarly within his own reach and control, raises the presumption, open to explanation, of course, that the testimony, if produced, would be unfavorable to him."

The Supreme Court of Kansas in the more recent case of *Federal Trust Company* v. *Allen*, 204 Pac. 751, again emphasizes the rule:

> "The established rule, at least in civil cases, and applying alike to plaintiff and defendant, is that where a party has it within his power to produce witnesses, presumably favorably disposed toward him, to explain a transaction, or answer a controverted question, and fails to do so, it will be presumed that the testimony, if produced, would be unfavorable to his side of the controversy (citing cases) * * *. Courts and text writers generally speak of it as a presumption, but it is more properly defined as an inference of fact, and not as a presumption of law. The Fowler case, *supra*, recognizes the qualification of the rule, adopted generally, that the inference will not be drawn if the failure to produce the evidence is satisfactorily explained."

The Oklahoma Courts have adopted and followed the rule in several cases, among which is *Freeman* v. *State*, 203 Pac. 1052, where the following language is found:

> "The correct rule as to the presumption arising where a party fails to introduce important testimony relating to facts within his knowledge and control and peculiarly within his reach is that such failure raises the presumption, open to explanation, of course, that the testimony, if produced, would be unfavorable to him."

Hundreds of cases might be cited, but the above citations indicate the unanimous position of the courts. It

was the duty of the Government to introduce testimony as to the lawfulness of the attempted sales and purchases of livestock; it devolved upon the Government, under the circumstances, to show that such acts upon the part of the Association were not *ultra vires*. It was the duty of the Government to produce the proof, which was entirely and exclusively within its possession, knowledge and control, as to whether the stock offered for sale by the Association was the property of members of the Association, of non-members or of the Association itself. Having failed to do so, the presumption is that the evidence would have been unfavorable to the position of the Government and would have proved that the acts of the Association in attempting to sell stock were *ultra vires* because the stock was not owned by members of the Association. All of the acts of the Association in attempting to buy and sell stock being unlawful, there was no unfair or unjustly discriminatory practice or device indulged in by the appellees in refusing in concert to join with the Producers Commission Association in the doing of an unlawful act or the making of an unlawful contract. The contention of the Government must therefore fall.

But there is another very strong reason for the Court to refuse to presume that the acts of the Producers Commission Association in attempting to sell livestock to appellees were lawful acts, and not *ultra vires*. We desire to state it as the next argument in opposition to the Government's position.

Proposition III.

One presumption cannot be based upon another presumption.

ARGUMENT.

We think the simple statement of this proposition should be sufficient argument as to its soundness.

However, we call attention to the following cases and authorities:

In *United States* v. *George W. Ross*, 92 U. S. 281, 23 L. ed. 707, this Court said:

> "It is incumbent upon a claimant under the Captured and Abandoned Property Act, to establish that the property captured or abandoned came into the hands of the Treasury Agent; that it was sold; that the proceeds of the sale were paid into the United States Treasury, and that he was the owner and entitled to the proceeds thereof.
>
> "Because officers are presumed to have done their duty it is not the law that the court can conclude that the property was delivered by the military officer to a treasury agent; that it was sold by him, and that the proceeds were covered into the Treasury. The presumption that public officers have done their duty does not supply proof of a substantive fact."

In *Brady* v. *United States*, 24 Fed. (2d) 399, 403-4, the Circuit Court of Appeals for the Eighth Circuit said:

> "To maintain the judgment, we must hold that the jury were warranted in presuming from this evidence, and this evidence alone: First, that the letters were enclosed in envelopes addressed to Mergen at Beloit,

Kansas; second, that the defendants caused the letters to be duly stamped and mailed; and, third, that the postoffice at Beloit, Kan., received them and delivered them to Mergen. To do this we would have to permit presumption upon presumption * * *. It is well settled that presumptions cannot be based upon presumptions" (citing authorities).

See, also:

Schaff v. *Ferry* (Okla.), 232 Pac. 407.

Star v. *Brumley* (Okla.), 263 Pac. 1086.

Holt v. *Sather* (Mont.), 264 Pac. 108.

22 C. J. 85, paragraph 27.

In the case before the Court, we are asked to presume:

First. That the corporate entity of the Producers Commission Association had continued.

Second. We are asked to presume that the Association had a membership.

Third. We are asked to presume that the presumed membership was composed of producers of livestock.

Fourth. We are asked to presume that the marketing of livestock was one of the object stated in the Association's Articles of Association.

Fifth. We are asked to presume that the stock offered for sale by the Association was stock belonging to and produced by its presumed membership. We are asked to indulge this latter presumption as a legal conclusion in spite

of the fact that under the Oklahoma statute of its creation, the Association could with equal legality either (a) sell stock belonging to its members as the producers thereof, or (b) purchase stock from its presumed membership and sell such stock as the owner thereof.

Since either character of sale—that as agent or that as principal—would be equally legal under the Oklahoma statute, it would be just as reasonable to presume one state of facts as to presume the other. But if the second state of facts be presumed, namely, that the Association was selling its own stock, the Association would be acting in the role of a dealer and not of a market agency, and since appellees are charged with using, and were found by the Secretary of Agriculture to have used, unfair and unjustly discriminatory practices and devices against the Producers Association as a market agency, the Government would be hoist with its own petard.

The fallacy of the Government's position seems to us, in this particular, to be two-fold:

1. It asks the Court to indulge a presumption favorable to the Government's case, which is necessarily built upon other presumptions.
2. As to that pyramided presumption, the Government asks the Court to arbitrarily choose one of two presumptions equally sane, equally legal and equally reasonable, for no better reason than that it takes that particular presumption to make a case for the Government.

At page 22 of the Government's brief appellant says:

> "To justify a refusal to buy livestock from such agencies as the Producers Commission Association, having limited powers, because of the possibility of their exceeding their powers by offering livestock obtained from non-members, would exclude such co-operative marketing agencies from operating on public stockyards, although their right to do so seems to be expressly recognized by Section 306 (f)."

We dispute the contention of the appellant that the right of a co-operative marketing agency, such as the Producers Commission Association, to operate on public stockyards is expressly recognized by Section 306 (f) or by any other section of the Packers and Stockyards Act. That act is very careful not to define, in any manner, the words "Co-operative Association," as used therein, and if an association elects to organize itself under a law which so circumscribes and limits its powers that it cannot, under the law of its creation, carry on the ordinary business of a market agency, neither the Packers and Stockyards Act nor any other act, except that of the Governmental agency creating it, can imbue it with the powers of a market agency. Neither the Secretary of Agriculture, the Congress of the United States nor any other power can, by any species of declaration or fiat or order, place the flesh and blood of a market agency upon the skeleton of a so-called co-operative association, which is so limited in its powers as to be such only in name.

On the same page of appellant's brief is found this language:

> "The boycott operated against all the business of the Association. The order of the District Court leaves the Association in a position where it is subject to a boycott, although it may confine its business within the limits of its corporate authority. The boycott may continue against its legitimate business, although as disclosed by the concurring opinions below, it may be open to the Association to amend its charter under the statutes of Oklahoma so as to enable it to broaden its powers and obtain corporate authority to do all that it has done."

The reasoning of the appellant, contained in this paragraph, seems to us to be extraordinarily specious and unsound. The only acts, which are affected in the least by the Secretary's order or by the injunction granted by the District Court against the order of the Secretary, are those acts which have been committed in the past. If the Producers Commission Association is not a market agency, as we contend, and if, as we further contend, all of its acts with reference to the handling of livestock upon the Oklahoma City Stockyards are unlawful, then, of course, the effect of the order would be to declare the inability of the Producers Commission Association to act in any capacity as a market agency upon the stockyards. We think this should be the holding of this Court as to the status of that Association. If, however, the Court should hold that certain livestock operations by that Association upon the stockyards may be conducted by it as a market agency, then

the appellees could not, in any way, by the decision in this case, be protected in any unfair or unjustly discriminatory practices or devices with reference to any such future business with the Producers Commission Association as a market agency. It would simply devolve upon the Producers Commission Association in any future action, which might be brought against appellees or others under the Packers and Stockyards Act, to prove that at the time of the attempted deals with appellees or others, that Association was acting as a market agency within its legal rights and under its limited powers. The statement that a boycott may continue against the legitimate business of the Producers Commission Association by reason of any holding of the District Court or of the affirmance of the District Court's order by this Court is entirely unwarranted.

Certainly, the question as to whether or not the Producers Commission Association can, under the laws of the State of Oklahoma, amend its Articles of Association so as to enable it to broaden its powers and to obtain corporate authority to do all that it has done, has no bearing upon the question at issue now. The propositions submitted at this time do not deal with what the status of the Producers Commission Association may become in the future, but what its status was at the time covered by the Secretary's complaint. In passing, however, it might be well to state that, in our opinion, no amendment, which the Producers Commission Association can make to its Ar-

ticles of Association, will clothe it with any broader powers than it can have under the law of its creation, namely, Chapter 181, Session Laws of 1923. If the Producers Commission Association desires to be clothed with the broad powers of a co-operative corporation, in our judgment, it must again organize as a new corporation under the provisions laid down by the 1919 Act, as found in Sections 5637 to 5652 of the Statutes of the State of Oklahoma.

CONCLUSION

We respectfully submit to the Court that the decision and order of the trial court in this cause should be sustained and the case affirmed.

Respectfully submitted,

HALL & THOMPSON,
FRED E. SUITS,
Attorneys for Appellees.